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Nos. 95-285 and 95-5697

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NORMA A. GILHAM AND COLLEEN A. BARCUS,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF OF AMICUS CURIAE BLACKFEET TRIBE

IN SUPPORT OF WRITS OF CERTIORARI

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INTEREST OF AMICUS

The Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, is a federally recognized Indian tribe occupying a reservation of over 500,000 acres in north central Montana. The Tribe is organized as a constitutional government under section 16 of the 1934 Indian Reorganization Act, 25 U.S.C. § 476.

The Blackfeet Tribe has an interest in these cases because serious jurisdictional issues are raised concerning the authority of state officials to stop Blackfeet tribal members on the Blackfeet Reservation and to execute a state search warrant against property of tribal members. Assertion of such authority by state officials impacts the sovereignty and self-determination of the Blackfeet Tribe and the Tribe's ability to govern its own members within the Reservation boundaries.

STATEMENT OF THE CASE

On April 18, 1993, Norma Gilham and Colleen Barcus were the sole occupants of an automobile which was stopped by Montana Highway Patrolman Tony Cox. The stop took place within the exterior boundaries of the Blackfeet Indian Reservation. Both Gilham and Barcus are enrolled members of the Blackfeet Tribe. The stop by the State law enforcement officer was made pursuant to a search warrant issued by the Justice of the Peace, Glacier County, Montana. The automobile was stopped for speeding, an admitted pretext, while the Glacier County search warrant could be located and served upon Gilham and Barcus.

Cox detained Gilham and Barcus at the point of stop until Glacier County Deputy Sheriff Wayne Dusterhoff arrived with the search warrant issued by the Justice of the Peace. When Dusterhoff arrived and while he was reading the search warrant, Barcus fled the scene. Various law enforcement officers pursued Barcus and she

was ultimately apprehended and arrested while still on the Reservation. The automobile was seized and a federal warrant was subsequently obtained to search the automobile. Evidence from the stop and from the search was used in the federal criminal proceedings against Gilham and Barcus. Both Gilham and Barcus were eventually convicted on charges of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Both are currently in federal custody.

SUMMARY OF ARGUMENT

The search warrant under which Petitioners Gilham and Barcus, Blackfeet tribal members, were stopped on the Blackfeet Reservation could not be executed by state law enforcement officials against tribal members on the Reservation. It is well-established that states lack criminal jurisdiction over Indian offenders on a reservation or within Indian country. Solem v. Bartlett, 465 U.S.

463, (1984); U.S. v. John, 437 U.S. 634 (1978). Because states lack criminal jurisdiction, state law enforcement officials also lack jurisdiction to execute state court warrants against Indian offenders on a reservation. United States v. Baker, 894 F.2d 1144, 1146 (10th Cir. 1990); U.S. v. Anderson, 857 F.Supp. 52, 54 (D.S.D. 1994).

While states may assume criminal jurisdiction on Indian reservations under P.L. 83-280, 18 U.S.C. § 1162 and 18 U.S.C. § 1350, the State of Montana has never assumed such jurisdiction over the Blackfeet Reservation. Neither has the Blackfeet Tribe otherwise authorized state law enforcement officials to execute state court search warrants on the Reservation.

This Court has not specifically held that state law enforcement officials lack jurisdiction to execute state court warrants against Indian offenders within an Indian reservation, although lower courts have so held. Such a conclusion flows from the States' lack of criminal

jurisdiction over such offenders. The Court should clarify this issue which has significant importance in the development of appropriate law enforcement on Indian reservations, and to a tribe's continuing authority to govern its members.

ARGUMENT

The Court Should Review These Cases to Confirm That Execution of a State Court Search Warrant Against Indians or Indian Property Within an Indian Reservation is Prohibited Without Congressional Consent

A. The State Lacks Jurisdiction to Issue, and State Law Enforcement Officers Lack Jurisdiction to Execute, a Search Warrant Against Blackfeet Tribal Members on the Blackfeet Reservation

Indian tribes are "distinct, independent political communities, retaining their original natural rights in matters of local self-government." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978). Their rights of self-governance, however, can be limited, modified or even eliminated by Congress, id. at 56, but only if Congress explicitly authorizes such a divestiture. Absent an explicit congressional authorization, Indian tribes retain their

rights of self-governance and states lack jurisdiction over Indians or Indian property on the reservation. See Bryan v. Itasca County, 426 U.S. 373, 376-77 (1976); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 170-71 (1973); Williams v. Lee, 358 U.S. 217, 220 (1959).

In the particular area of criminal jurisdiction, tribal courts and/or federal courts have exclusive jurisdiction over offenses committed by tribal members on their reservation. See 18 U.S.C. § 1152 (Indian Country Crimes Act), and 18, U.S.C. § 1153 (a) (the Major Crimes Act). See also Negonsett v. Samuels, ___ U.S. ___, 113 S.Ct. 1119, 1121-22 (1993); United States v. Wheeler, 435 U.S. 313 (1978). Thus, the states are prohibited from exercising jurisdiction over crimes committed by Indians within Indian reservations. Solem v. Bartlett, 465 U.S. 463, (1984); U.S. v. John, 437 U.S. 634 (1978).

Because state courts lack criminal jurisdiction over Indian offenders on Indian reservations, state courts also

lack jurisdiction to issue search warrants against Indians or Indian property on reservations. United States v. Baker, 894 F.2d 1144, 1146 (10th Cir. 1990) (County District Court acted beyond its authority in issuing a search warrant for evidence on reservation property of an Indian). And, state law enforcement officials lack jurisdiction to execute state court warrants within Indian reservations. U.S. v. Anderson, 857 F.Supp. 52, 54 (D.S.D. 1994) (parole agents lack criminal jurisdiction to conduct a warrantless search of Indian's residence within Indian country).

In 1953, Congress provided for the extension of state jurisdiction over criminal matters on Indian reservations through P.L. 83-280, codified at 18 U.S.C. § 1162 and 18 U.S.C. § 1350. However, the State of Montana did not choose to assume criminal (or civil) jurisdiction over the Blackfeet Indian Reservation at that time or in any subsequent years.

Congress added an additional requirement to state

assumption of jurisdiction when it enacted the 1968 Indian Civil Rights Act, 25 U.S.C. § 1301, et seq. Section 1321 of the Act provides for an assumption of criminal jurisdiction by states "with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption...." The Blackfeet Tribe has never consented to an assumption of criminal jurisdiction by the State of Montana in a special election called for that purpose as required by 25 U.S.C. § 1321.

Section 1321 makes clear that Public Law 280 as amended by the Indian Civil Rights Act is the sole mechanism by which the State of Montana could assume jurisdiction over criminal offenses committed by or against Indians in Indian country, including the offenses alleged to have been committed by Gilham and Barcus.[1]

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[1] The law is equally clear that absent tribal consent, a state has no jurisdiction over highways running through Indian lands in the state. Rosebud Sioux Tribe v. State of South Dakota, 900 F2d. 1164 (8th Cir. 1990); cert denied 500 U.S. 915 (1991).

See Kennerly v. District Court, 400 U.S. 423 (1971). Since Montana has not assumed criminal jurisdiction under the procedure provided for by Congress, State Patrolman Cox and Glacier County Deputy Sheriff Dusterhoff indisputedly lacked jurisdiction to stop Gilham and Barcus as members of the Blackfeet Tribe on the Blackfeet Reservation.

B. The Provisions of Blackfeet Law Authorizing Cross-Deputization Does Not Provide Jurisdiction to Execute the Search Warrant Against Tribal Members on the Reservation

The Blackfeet Tribe and the State of Montana have a long-standing mutual recognition of criminal activities and law enforcement problems on the Blackfeet Indian Reservation. The parties as respective sovereigns have attempted to address the issues through cross-deputization agreements.

In 1959, the Blackfeet Tribal Business Council, the governing body of the Blackfeet Tribe, enacted Blackfeet

Tribal Ordinance No. 9-59, providing for, among other things, the issuance of deputy commissions to the Montana Highway Patrol as tribal police. Cross-deputized officers have "the same powers to apprehend and arrest persons subject to the jurisdiction of the Blackfeet Tribe as the tribal police." See Blackfeet Tribal Ordinance No. 9-59, attached hereto as Appendix A. In the Ordinance, the Tribal Council also adopted the traffic and highway laws of the State of Montana as tribal law.[2]

This Ordinance provides for the Blackfeet Tribe to commission an officer of the Montana Highway Patrol as a special deputy to enforce the laws of the Blackfeet Tribe on the Blackfeet Indian Reservation. Tribal members and other Indians who commit criminal offenses

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[2] The Blackfeet Tribal Business Council had authority to enact Ordinance 9-59 under the provisions of the Blackfeet Constitution. Article VI, Section 1 (k) authorizes the Council to "promulgate ordinances for the purposes of safeguarding the peace and safety of residents of the Blackfeet Indian Reservation..." Article VI, Section 1 (a) also authorizes the Council to "negotiate with Federal, State and local Governments on behalf of the tribe..."

are brought before the Blackfeet Tribal Court for prosecution. Ordinance 9-59 at paragraph 1.d.

The Montana Highway Patrol approved and agreed to the substantive terms and conditions contained in Ordinance No. 9-59, see approval noted on Ordinance 9-59. This arrangement governed the enforcement of Tribal traffic and highway laws by the Montana Highway Patrol until recently.

The cross-deputization arrangement under Ordinance 9-59 is not a grant of jurisdiction to the State of Montana. Instead, it merely provides a mechanism by which a duly commissioned state law enforcement officer can assist in the enforcement of the laws of the Blackfeet Tribe on the Blackfeet Reservation. The Ordinance cannot and does not validate what is an otherwise extra-jurisdictional state court warrant, nor does it authorize execution of state warrants.

Earlier this year, the Blackfeet Tribal Business Council and the State of Montana entered into a new

agreement. The new agreement was negotiated after the State of Montana raised questions concerning the validity of the 1959 cross deputization arrangement in light of the intervening Montana State-Tribal Cooperative Agreements Act of 1981, MCA § 18-11-101, et seq. This Act provides that in any agreement between the State of Montana and an Indian tribe regarding law enforcement, the agreement must include the following:

(a) the minimum training standards and qualifications of law enforcement personnel;

(b) the respective liability of each public agency and tribal government for the actions of law enforcement officers when acting under the provisions of an agreement;

(c) the minimum insurance required of both the public agency and the tribal government; and

(d) the exact chain of command to be followed by law enforcement officers acting under the provisions of an agreement.

Section 18-11-111 of the Cooperative Agreement Act further states that the Act does not affect the validity of any agreement between a tribe and a state agency which was entered into prior to July 1, 1981. However,

any such agreement must satisfy the requirements of the Act no later than July 1, 1983.

None of the four conditions of the Montana Cooperative Agreement Act was contained in the 1959 Ordinance, nor was the Ordinance subsequently amended to comply with the Act. The State of Montana treated the cross-deputization arrangement as implicitly invalid because of the non-conforming nature of the arrangement, and the Montana Highway Patrol was directed "to refrain from issuing tickets to tribal members on the Reservation until the Agreement was reached." See Letter dated February 14, 1995, from Sarah A. Bond, Assistant Attorney General, State of Montana, to Donald G. Kittson, Blackfeet Legal Department, copy of which is attached hereto as Appendix B.

Since the cross-deputization arrangement did not and does not comply with the 1981 Act, any cross-deputization of Patrolman Cox cannot be used as a basis for jurisdiction to stop Gilham and Barcus. Therefore to

the extent that cross deputization of Patrolman Cox is relied on as the basis for executing the state court warrant, it must fail as a matter of state law.

C. Clarification of Authority to Execute State Court Search Warrants Within Indian Reservations is Important to Maintain Law Enforcement on Indian Reservations and is Essential to Tribal Self-Government

Law enforcement on the Blackfeet Reservation, like other Indian reservations, is complicated because criminal jurisdiction on the Reservation "is governed by a complex patchwork of federal, state, and tribal law." Negonsott v. Samuels, ___ U.S. ___, 113 S.Ct. 1119, 1121 (1993). It is therefore of major importance that law state, federal and tribal law enforcement officials understand their authority and their limits. Otherwise, offenders who should be convicted may go free, and offenders who should be prosecuted may go unprosecuted.

Equally important is the right of tribal governments, as sovereign entities, to govern their own members within the territorial boundaries of their Reservation. Execution of state court search warrants against tribal members on

the reservation clearly undermines tribal self-government. Cf. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1984); Williams v. Lee, 358 U.S. 217 (1959).

Recognition of tribal sovereignty in the context of this case would have required the state law enforcement officials to take the simple step of obtaining the concurrence or endorsement of the Blackfeet Tribal Court on the state court warrant. This Court should clarify the need to take this simple step which would, at the same time, recognize the sovereign authority of the Tribe and contribute to law enforcement on the Reservation.

CONCLUSION

For the reasons stated above, this Court should grant the petitions for certiorari to confirm that state court search warrants cannot be executed against Indians or

Indian property involving tribal members on their own reservation.[3]

Respectfully submitted,

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[3] The Petitioners address the issue of whether there is any basis, other than the jurisdictionally invalid state court search warrant for admission of the evidence obtained. The Tribe would note that a jurisdictionally invalid search warrant, unlike a search warrant that is merely technically deficient, may preclude any evidence obtained as a result of the void search warrant. Compare United States v. Baker, 894 F.2d 1144, 1148 (10th Cir. 1990).